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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1450

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this matter on February 1, 1973.

OPINIONS BELOW

The February 1, 1973, opinion of the Court of Appeals, as yet unreported, is reprinted as Appendix B to this Petition. The August 18, 1971, opinion of the United States District Court for the Southern District of Indiana, is

reported at 332 F.Supp. 655, and is reprinted as Appendix A herein.

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1973. The petition for Certiorari was filed less than 90 days from the date of the judgment of the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the legal standards used in the Courts below to determine the presence of *de jure* segregation, which have been applicable to school boards in determining the effectiveness of a school desegregation plan (*i.e.*, remedial cases), are also applicable to school boards in determining the presence of *de jure* segregation in the first instance (*i.e.*, initial violation cases).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. § 2000c-6(a) and (b), and 28 U.S.C. § 1345. These provisions have been reprinted in Appendix C herein.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was invoked pursuant to 42 U.S.C. § 2000c-6(a) and (b), and 28 U.S.C. § 1345.

On May 31, 1968, the United States filed a school desegregation action in the United States District Court for

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the Southern District of Indiana, the Honorable S. Hugh Dillin, presiding trial judge. The Defendants in said cause were the Board of School Commissioners of the City of Indianapolis, Indiana, and its individual members (hereinafter referred to as the Defendants). On August 18, 1971, the trial judge filed a Memorandum of Decision in favor of the Plaintiff, United States, and directed orders against the Defendants. That opinion is recorded at 332 F. Supp. 655 (1971), and is set out as Appendix A herein.

On September 10, 1971, the Defendants filed a Notice of Appeal pursuant to Rule 3 of the Federal Rules of Appellate Procedure to the United States Court of Appeals for the Seventh Circuit. That Court, after hearing argument on September 13, 1972, affirmed the judgment of the District Court on February 1, 1973, in a written opinion, which is set out as Appendix B herein.

The Indianapolis Public Schools

The Indianapolis Public School System has existed pursuant to the law of the State of Indiana since 1853. The situs of the school district is in the City of Indianapolis, Indiana.

During the 1970-71 school year (immediately prior to trial), the Defendants operated 110 Elementary Schools and 11 Senior High Schools. Among the 110 Elementary Schools, there were 6 Junior High Schools and 3 Special Education Schools. The remaining Elementary Schools housed either kindergarten through 8th grade or kindergarten through 6th grade students.

The racial composition of the student population from 1966 to the present, based upon Fall Enrollment figures, is shown by the following table:

Year	Negro	White	Total	% Negro
1966	34,481	73,005	107,486	32%
1967	35,699	73,044	108,743	33%
1968	36,586	72,025	108,611	34%
1969	37,692	70,530	108,222	35%
1970	38,126	68,188	106,314	36%
1971	38,799	63,935	102,734	38%
1972	38,630	59,167	97,797	40%

The Evidence

Prior to 1949, statutes existed in the State of Indiana which permitted, but did not require, the establishment of all-Negro schools. During the 1948-49 school year, the Defendants maintained 16 all-Negro Elementary Schools and all-Negro Crispus Attucks High School. During that school year, these 17 schools housed 94.6% of the Negro student population. 332 F.Supp. at 665, App. p. A17.[1] The remaining 5.4% of the Negro student population attended racially-mixed schools.

In 1949, the Indiana General Assembly passed an Act which required all Indiana schools, including the Defendants, "to provide, furnish and make available equal, non-segregated, non-discriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex. . . ."[2] The Act further required the Defendants to permit students entering for the first time the public kindergartens, the first grades of Elementary Schools and first year departments of Senior High or Junior High Schools to enroll in the school within their district. This enrollment pattern was to continue in

1. Citations to the Appendix will be given as "App. p. —."
2. Acts 1949, Ch. 186, § 1, p. 603; Indiana Statutes Ann., § 28-6106 (1970 Repl.). For the entire Section, see Indiana Statutes Ann., § 28-6106—28-6112 (1970 Repl.), or IC 1971, 20-8-6-1 through 20-8-6-7.

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the future so that eventually each school in the system would be attended by students living within that particular school's district.

In 1953, the Defendants drew fixed boundary lines for all Elementary Schools. In drawing these boundaries, attempts were made to maximize utilization of facilities as well as to permit students to attend the school nearest their residence. Limited optional attendance provisions were in effect in some of the attendance districts (PX 88).[3] At the close of the 1953-54 school year, 3, 766 Negro students (approximately 28% of the total Negro enrollment) were attending schools with white children, which schools, prior to the 1949 statute, had been predominantly or all white schools (PX 1, 1953-54 School Year). Moreover, in 1953-54, white and Negro children were enrolled together in a total of 61 schools; by 1967-68, the number of such schools had increased to 90. (PX 1) Thus, it cannot be seriously contended that the Defendants were maintaining a dual school system (a system composed of separate, but equal, facilities) in 1954 or 1968.

From 1954 to the 1967-68 School Year, the student enrollment in the Elementary Schools increased from 53,352 to 82,853. 332 F.Supp. at 666, App. p. A19. Accordingly, the number of schools rose from 87 regular Elementary and Junior High Schools to 113; the number of High Schools increased from 8 to 11. 332 F.Supp. at 666-667, App. p. A19. During this same 13 year period, the total Negro student enrollment increased from 13,501 to 35,699, a gain of 22,198 (PX 1).

From 1950 to 1970, the increase in the Negro population located within the center-city was substantial; during that

3. Exhibits will be identified by reference to the party below introducing them; *i.e.*, "PX——" and "DX——" for Plaintiff's and Defendants' exhibits, respectively.

same period, the white population in the center-city decreased. (DX K-1 through K-14) Therefore, many schools which were predominantly white in 1954 were predominantly black in 1968. (PX 1)

The most notable exception to this population expansion trend is found in the trial court's discussion concerning the location of "low-rent" housing projects. 332 F.Supp. at 673, App. p. A31. The impact on the schools due to the location of these projects was substantial in later years. 332 F.Supp. at 673-674, App. pp. A31-32.

The increase in population over the 1954-68 period caused overcrowding problems in many of the schools. The methods employed by the Defendants to alleviate overcrowding were varied: *e.g.*, additions to existing schools, construction of new schools, attendance zone boundary changes, portable classrooms, or combinations of the above.

Prior to the 1968-69 School Year, it was the policy and practice of the Defendants to assign teachers to schools so that, in general, the faculty at each school mirrored the racial composition of the school's student body. This fact was stipulated by the Defendants, and both parties agreed generally to the relief ordered by the trial court on August 5, 1968. All vestiges of this practice were erased prior to trial. (DX DD and EE)

The Finding of Fact and Trial Court Rulings

The charge against the Defendants was other than that they maintained a dual school system. It was that the Defendants had developed school boundary changes, feeder patterns, teacher assignments and school construction policies which *in some instances* had the effect of segregating students on the basis of race.

The District Court made extensive findings of fact, and some of those findings were related to the Government's evidence. But much of that Court's opinion did not concern the Defendants; rather it was an extended denunciation of the State of Indiana and its whole people, living and dead, from before 1816 to the present time. The spirit of that remarkable assertion is the District Court's proposition that because the State of Indiana was "founded" by persons who came, in part, from the State of Virginia, it became infected with the "culture of the southern country gentleman," 332 F.Supp. at 659, App. p. A7, and the racial attitudes of such persons as a former President, William H. Harrison. The State of Indiana and her people, condemned in origin, remained thus condemned and contaminated for all time to come, or at least until August 18, 1971.

That portion of the District Court's finding was neither attacked nor defended on appeal because it was thought to be neither relevant nor material to the issues raised by the Complaint. It is referred to here only because it shows the mind-set with which the District Court approached the remaining evidence in the case.

The gist of the District Court's evidentiary analysis is that there was a *duty incumbent upon the Defendants to effect a racial balance* among the children of different races in the public school system. Thus, every act or omission of the Defendants from 1949 to August 18, 1971, which failed to effect a racial balance in the public schools was found by the District Court to constitute an act of *de jure* segregation.

The following acts and/or omissions are typical of those found by the District Court to constitute *de jure* segregation:

1. In regard to the fixed attendance district boundary lines which were drawn in 1953, the Court found:

> "Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools." 332 F.Supp. at 666, App. p. A18.

With this finding, the Court condemned for all time the establishment of neighborhood schools for any city such as Indianapolis where the Negro population (in 1953) was located almost entirely in one section of the city. (DX K-12 through K-14) The trial court even recognized that, generally, the pre-1949 "colored" schools were located in Negro residential areas. 332 F.Supp. at 665, App. p. A17. Therefore, many of these schools remained predominantly, but not entirely, Negro. In retrospect, it is abundantly clear that after 1949 the only proper course of action for the Defendants—which would have been approved by the District Court—would have been to transfer Negro children into schools located in almost all-white neighborhoods and to transfer white children into schools located in almost all-Negro neighborhoods, thus effecting a racial balance. The "failure" to do this in 1953 provided the District Court in 1971 with an "original sin."

2. In regard to the 1953 boundary lines, the Court further found:

> "In some instances segregation was promoted by drawing boundary lines which did not follow natural boundaries or were not equidistant between schools." 332 F.Supp. at 666, and see f.n. 54, App. p. A18.

The Court first observed that the common boundary line for Schools #36 and #60 was not equidistant between the two schools (see map, PX 169, p. 7). The Court then noted that Negro students were required to cross what could be

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referred to as "natural" boundaries to attend Schools #42 (100% Negro in 1953-54) and #26 (99.8% Negro) rather than being required to attend Schools #44 (1.2% Negro) and #10 (9.7% Negro), respectively.

Here the Court merely searched the record and found three boundary lines (in a school system composed of 87 regular Elementary and Junior High Schools in 1954) which, had the boundaries been drawn in a different manner, may have temporarily resulted in a greater racial balance in three of the six schools involved. The Court did not consider in its opinion whether or not the lines were drawn in a logical or reasonable manner in view of all of the facts and circumstances involved. More importantly, the Court did not attempt to explain, nor did the evidence show, how these 1953 boundary lines promoted or effected segregation consistent with that found in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, (1954) *(Brown I)*. And the facts are that the predominantly Negro schools (#26, #36 and #42) remained predominantly Negro up until the time of trial when they were 97.1%, 100% and 100% Negro, respectively. (PX 1) The predominantly white schools (#10, #44 and #60) became predominantly Negro as the Negro population increased and migrated (their movement not being restricted) into those districts. This is best illustrated by the following table, using data from PX 1:

Year	% of Negro School #10	% of Negro School #44	% of Negro School #60
1954-55	11.12%	2.32%	21.69%
1956-57	20.10%	11.99%	37.07%
1959-60	36.33%	60.60%	42.00%
1967-68	74.42%	98.12%	95.49%

It is patently clear that the 1953 boundary lines were not the first step of an attempt to maintain "white" and "black" schools. These three boundaries were condemned, however, because they failed to effect a greater racial balance in the public schools in 1953, prior to the *Brown I* decision.

3. After noting that racial imbalance in the schools still existed at the advent of the post-*Brown I* era, the Court stated:

> "The Board thus began the post-*Brown I* era in May, 1954, in substantially the same position that it ended the official segregation era in 1949. The schools were still segregated by operation of law, by virtue of the acts and omissions of the Board done in defiance of the new requirements of Indiana law." 332 F.Supp. at 666, App. p. A19.

This finding was clearly erroneous and historically false. The State of Indiana has never had an "official segregation era." Furthermore, after 1949, Indiana law only required that children be permitted to enroll in the school within their district and it still does; there was no requirement that any degree of racial balancing was to be achieved. As will be seen, this finding proved to be significant in the Court of Appeals. There it was found sufficient to taint an entire school system and also to justify the application of remedial case law standards to every future act or omission by the Defendants which failed to effect a racial balance in the schools.

4. It was found that the Defendants had "built additions at Negro schools and then zoned Negro students into them from predominantly white schools. . . ." 332 F.Supp. at 667, also see f.n. 56, App. p. A20.

The facts are that, far from promoting segregation, the change which resulted (and was condemned) actually pro-

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moted integration—as shown by the following analysis. It should first be observed that the addition to School #36 was recommended as early as February, 1957. (PX 49) The predominantly white school, School #60, was 47.1% Negro before the boundary change and was 42.0% Negro after the boundary change. (PX 1) School #36 dropped from 99.9% Negro to 96.4% Negro after the boundary change. (PX 1) The percentage of Negro students at both schools was thus altered in a direction which approached the then city-wide elementary percentage of 24.6%. However, because it failed to achieve the Court's desired racial balance, it was found to be an act of *de jure* segregation.

5. The trial court found that the Defendants had "failed to reduce overcrowding at schools of one race by assigning students to use newly built capacity at schools of the opposite race." 332 F.Supp. at 667, see also f.n. 57, App. p. A20. The essence of this holding is that the District Court again condemned the Defendants for failing to effect a racial balance some fourteen years previously by their failure to assign white students at School #51 to fill the eight-room addition completed at School #37. The court apparently disregarded the Housing Facilities Report for February, 1957, which indicates that "all classrooms within the addition opened just a year ago are filled." (PX 49) The average class size for the elementary grades at School #37 in the fall of 1958 was 35.6. (PX 39, p. 92) At that same time, the average class size at School #51 was 35.0. (PX 39, p. 92) The city-wide average for Elementary Schools in the fall of 1958 was only 34.5. (PX 39, p. 95) Clearly, no class size improvement would have been realized if the defendants had assigned School #51 pupils to School #37. Such a move would have necessitated a simultaneous reassignment of School #37 pupils to School #51. It should also be observed that the Defendants did

not prevent Negro students from attending School #51. As the Negro population migrated into the School #51 attendance district the percentage of Negro students at School #51 gradually increased. Thus, during the 1960-61 school year, the percentage of Negro students at School #51 was 5.09; during the 1962-63 school year, the percentage increased to 18.5; during the 1964-65 school year, the percentage had increased to 31.28; during the year this action was filed, the percentage of Negro students at School #51 had increased to 55.61. (PX 1) Nevertheless, the Defendants' failure to assign School #51 pupils to School #37 in 1957 or 1958, and thus effect a racial balance, was found to be an act of *de jure* segregation.

6. Unquestionably, one of the most important findings made by the District Court concerned attendance zone boundary changes:

> "According to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation." 332 F.Supp. at 670, App. p. A25.

The finding was clearly erroneous. Indeed, it is incredible, and tragically so. At trial, the Defendants read into evidence a list of boundary changes, by year, involving the boundaries for some thirty-two schools. (Tr. p. 761)[4] This evidence was offered only to prove that the Defendants had authorized various boundary changes in the past which improved the racial distribution for the schools involved. Subsequent investigation revealed certain errors in this list which were corrected by an exhibit (DX XX). This is the only evidence touching that finding.

The District Court did not understand. It concluded (erroneously) that those thirty-two boundary changes (out of a total of approximately 350 boundary changes since

4. Citations to the Transcript of the trial will be given as "Tr. p. —."

1954) were the only changes which resulted in an increase in the racial balancing of Negro children and white children in the schools, and that the remaining boundary changes therefore "promoted segregation." Furthermore, the Defendants offered the list of 32 schools as an example to show that numerous boundary changes had been made which caused a greater mixing of the races; the Defendants certainly did not contend that these boundary changes were the only boundary changes which increased the racial balance in the schools. In fact, a list of all boundary changes since 1954 indicating the schools involved was admitted in evidence. (PX 27) If one compares the racial composition of a school in the year immediately prior to a boundary change with the racial composition of that school in the year immediately following the change, one discovers that approximately 83 boundary changes improved the racial distribution in the schools (improved in the sense that the racial distribution was altered in a direction toward the then city-wide racial percentage figure). Further analysis reveals that 111 boundary changes altered the racial distribution in a direction away from the city-wide percentage. The remaining boundary changes resulted in essentially no change in racial distribution. (Compare PX 1 with PX 27) So two manifest errors developed in the District Court: (1) it erroneously used and computed percentage figures, and (2) it concluded that any boundary change which did not effect a racial balance was an act of *de jure* segregation.

Thus in this sense, the case represents a first full circle in desegregation litigation in the United States: acts which effected a racial mixture years ago (integration) are today called acts of "segregation" by the District Court, so that now the District Court can order a racial mixture pursuant to its own quota.

Petitioners do not intend to belabor this Court with a further extensive analysis of the evidence produced at trial; such an approach is more properly the subject matter of a brief. It was believed necessary, however, to firmly establish by the foregoing examples that the District Court approached the evidence with the view that Defendants were under a legal obligation to effect a racial balance in the schools. On appeal, the Defendants correctly argued that the racial imbalance which existed in the Indianapolis Public Schools was the result of other events, arising from housing patterns, and the like, and that the evidence was totally insufficient to support a finding of *de jure* segregation.

The Court of Appeals

Despite the fact that the evidence in the present case is almost identical to that found in *Bell* v. *School City of Gary, Indiana* (7th Cir., 1963), 324 F.2d 209, *aff'g.* 213 F.Supp. 819 (N.D. Ind., 1963), the Court of Appeals distinguished *Bell,* stating:

> "The present case—in which, as will be discussed below, the district court found gerrymandering of districts, segregation of faculty, and other indicia of a dual system—stands in marked contrast to the *Deal* and *Bell* cases, above, where the district courts made specific findings of no such discriminatory practices by the boards." (Docket No. 72-1031, CA 7, February 1, 1973, Slip Opinion, p. 4, App. p. A51)

The Court further observed:

> "In *Bell,* there was a specific finding that there was no change in the school district boundary lines, and thus no gerrymandering. Also in *Bell* there were examples of black students being transferred from predominantly black schools to predominantly white schools to relieve overcrowding." (Docket No. 72-1031, *supra,* f.n. 5, p. 4, App. p. A51)

The above language with which the Court of Appeals so easily disposed of one of the major contentions made by the Defendants on appeal is deserving of comment. First, it was observed that there were no boundary changes in the *Bell* case; this observation is quite remarkable due to the fact that nearly three pages of the trial court's memorandum of decision in the *Bell* case were devoted to the discussion of certain school boundary line changes in Gary, Indiana, made both *before Brown I* and *after Brown I*. See *Bell, supra,* 213 F.Supp. 823-825. Secondly, the Court of Appeals found great significance in the fact that there were examples in *Bell* of Negro students being transferred from predominantly black schools to predominantly white schools to relieve overcrowding. This practice was in effect for three schools at the time of trial in the *Bell* case. See *Bell, supra,* 213 F.Supp. at 826. These transfers were not in effect for those schools at the close of the 1961-1962 school year. See the chart depicting the number of students, by race, in the Gary, Indiana, schools, 213 F.Supp. at 821. The *Bell* case was decided on January 29, 1963; thus the transfer examples referred to by the Court of Appeals were instituted for the fall of 1962, probably either just before or just after suit was filed. Compare this with the statement made by the Court of Appeals in the present case:

> "A school board . . . cannot blithely say that it has become 'color blind' the day before a suit is filed and thereby avoid liability." (Docket No. 72-1031, *supra,* p. 3, App. p. A49)

With that statement in mind, Defendants cannot explain or understand why the Court of Appeals was so impressed with the transfer examples found in *Bell.* The Defendants are inclined to suspect that the Court of Appeals has found a distinction . . . without a difference. This distinction

was necessary however, because without it, the Court of Appeals could not have attempted to justify the trial court's approach to the evidence; *i.e.*, that the Defendants had a constitutional duty to effect a racial balance in the public schools. To accomplish this latter goal, it was necessary to determine that the "differences" which existed between the *Bell* case and the instant case were not merely sufficient to support a finding of segregatory practices aimed at a few schools; rather, these "differences" were found sufficient to support a finding of the existence of a *de jure* segregated school "system" in the City of Indianapolis in 1954. The Court of Appeals did not indicate how many schools, or which schools were *de jure* segregated; it only indicated that the "system" was *de jure* segregated, and the evidence is uncontradicted that a dual school system did not exist.

Having found a *de jure* segregated school system in Indianapolis in 1954, the Court of Appeals then affirmed the District Court's view that the Defendants were under an affirmative duty to effect a racial balance in the schools, holding:

> "Another principle which comes into play in examining the district court's opinion relates to the affirmative duty placed on a school board 'to convert to a unitary system in which racial discrimination would be eliminated root and branch' *Green* v. *County School Board of New Kent County,* 391 U.S. 430, 437-38 (1968). This affirmative duty attaches to any school system guilty of *de jure* segregation at the date it became illegal under *Brown I,* May 17, 1954. . . . It is in this sense clear that factors viewed as being reflective of *de jure* segregation in remedial cases would be similarly significant in the initial determination of whether or not there has been a violation of constitutional rights. It is in this way that the remedial cases are relevant to the

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present case." (Docket No. 72-1031, *supra*, p. 3, App. p. A49)

The Court of Appeals went on to discuss the acts which were found by the District Court to constitute acts of *de jure* segregation, and applied constitutional standards applicable to remedial situations. It then affirmed the District Court's judgment in all respects.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Court of Appeals Has Decided An Important Question of Federal Constitutional Law Which Has Not Been, But Should Be, Settled By This Court.

In *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) *(Brown I)*, this Court determined that in the field of public education segregation on the basis of race was a deprivation of equal protection of the laws as guaranteed by the Fourteenth Amendment. The Negro children involved in *Brown I* "had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race." *Brown I, supra*, 347 U.S. at 488. In *Brown* v. *Board of Education of Topeka*, 349 U.S. 294 (1955), *(Brown II)*, this Court concluded that school authorities who were maintaining racially segregated school systems (such as the type condemned in *Brown I*) were thereafter required "to achieve a system of determining admission to the public schools on a non-racial basis. . . ." *Brown II, supra*, 349 U.S. at 300-301. In *Alexander* v. *Holmes County Board of Education*, 396 U.S. 1218 (1969), a dual school system was defined as one having "one system for white students only and one system for Negro students only." 396 U.S. at 1218.

The instant case presents a situation strikingly different from the one presented in *Brown I*. Of great significance is the fact that Negro children were not being denied admission to schools attended by white children in the year 1971 (time of trial), the year 1968 (year suit filed), or the year 1954 *(Brown I decision)*. Furthermore, neither prior to 1954 nor at anytime thereafter, did the Defendants maintain a "dual" system as that term was defined in *Alexander* v. *Holmes County Board of Education, supra.* These facts are undisputed; therefore, under the existing law as enounced by this Court, it cannot be found that the Defendants—either at the advent of the post-*Brown I* era or at anytime thereafter—maintained a dual school system.

In the instant case, the trial court observed that racial imbalance existed in the Indianapolis Public Schools at the advent of the post-*Brown I* era, and concluded that the Defendants maintained a *de jure* segregated school system. 332 F.Supp. at 666. The Court of Appeals affirmed the validity of this approach, stating:

> "(E)ven though no particular racial balance is *per se* necessary, *Swann* does not say that such imbalance may not be considered as one factor from which the district court may infer a segregatory intent." (Docket No. 72-1031, CA 7, February 1, 1973, Slip Opinion, p. 5-6, App. p. A52)

Thus the Court of Appeals took this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), to stand for the proposition that *although a racial balance is not necessary, if it does not exist, segregatory intent is a permissible inference.*

The Court of Appeals then condemned the boundary lines which were drawn prior to *Brown I,* citing, for example, *United States* v. *Board of Education, Independent School District No. 1, Tulsa County, Oklahoma,* 429 F.2d 1253

(10th Cir. 1970). The boundaries in the *Tulsa* case, however, were drawn for the 1955-1956 school year during the post-*Brown I* era when the Tulsa defendants were under a constitutional obligation to dismantle a dual school system. See, *Tulsa, supra,* 429 F.2d at 1255.

The Court of Appeals went on to note numerous other acts of *de jure* segregation citing, in addition to *Swann, supra,* such cases as *Green* v. *School Board of New Kent County,* 391 U.S. 430 (1968), *Raney* v. *Board of Education of the Gould School District,* 391 U.S. 443 (1968), and *Monroe* v. *Board of Commissioners of the City of Jackson,* 391 U.S. 450, (1968). All of those cases involved *dual school systems;* all of those cases related to the remedial stage of the litigation when this Court was concerned with setting out standards or guidelines by which the effectiveness of a desegregation plan could be determined.

The Court of Appeals upheld the trial court's ultimate finding of *de jure* segregation, stating:

> "Although it might not be possible to infer the requisite discriminatory intent from any one instance or example in the record, it is clear that the district court found a purposeful pattern of racial discrimination *based on the aggregate of many decisions of the Board and its agents.*" (Our emphasis) (Docket No. 72-1031, *supra,* p. 5, App. p. A51)

Defendants attempted to defend against the Plaintiff's complaint under case law which spoke to the necessity of establishing segregatory intent and causation; *e.g., Taylor* v. *Board of Education of City School District of New Rochelle,* 195 F.Supp. 231 (S.D.N.Y. 1961), *aff'd.,* 294 F.2d 36 (2d Cir. 1961), *cert. denied,* 368 U.S. 940 (1961); *Bell* v. *School City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964); *Deal* v. *Cincinnati Board*

of Education, 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967). Defendants were certainly not prepared—nor should they have been required—to defend the effectiveness of a "desegregation plan" because in all prior school segregation cases it has first been necessary for the complaining party to establish that *de jure* segregation *existed* before the effectiveness of a plan became an issue. It is clear, however, that the District Court and the Court of Appeals were of the opinion that remedial case law was applicable.

Thus the question presented for review is whether a city, such as Indianapolis, which—prior to, at the advent of, and after the *Brown I* decision—has maintained what heretofore has been recognized in the law as a unitary school system, may be found guilty of *de jure* segregation by the application of constitutional standards previously expressed in remedial case law dealing with the dismantling of dual school systems. If the answer to this question is in the affirmative, this decision will have a tremendous impact on all cities which have established and maintained a "neighborhood school" attendance concept where substantial "*de facto* segregation" exists due to housing patterns. On Petition, Defendants assert that this is a new and important question of law which was erroneously decided in the courts below.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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